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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 198

MAURO JOHN MONTANA,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Mauro John Montana, prays that a writ of certiorari be issued to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, entering judgment in favor of the respondent, William P. Rogers and dismissing the amended complaint was entered on November 20, 1959, and is not reported. The Court's findings of fact and conclusions of law are reproduced in the certified record transmitted herewith. (R. 56-68).

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court was filed April 29, 1960, and is not yet reported, but is set forth in Appendix B *infra*. Petition for Rehearing filed by the petitioner was denied on May 26, 1960. It, also, is set forth in Appendix B *infra*.

On May 31, 1960, the United States Court of Appeals, for the Seventh Circuit, on motion of this petitioner made pursuant to Rule 28 of that Court, stayed the issuance of its mandate to and including the 30th day of June, 1960, for the purpose of allowing said petitioner to petition this Court for certiorari. A copy of said order is contained in Appendix B *infra*.

JURISDICTION.

This petition is filed within ninety days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Is this petitioner, born in Italy in 1906 of a native born American mother and an alien father within the definition of "the children of persons who now are, or have been, citizens of the United States," so as to be considered a citizen though born out of the limits and jurisdiction of the United States under the provisions of § 2172 of the Revised Statutes of 1874?

2. Does the overlapping of subject matter of § 2172 (concerning derivation of citizenship of foreign born children of citizen persons), and 1993 (concerning derivation of citizenship to foreign born children of citizen fathers), of the Revised Statutes of 1874, simultaneously

enacted, require abandonment of the one in favor of the other without attempt at reconciliation? Indeed, does the law allow such abandonment?

3. Does the word "now" in Section 2172, in the absence of express limitation, require interpretation as of the time of enactment, when the same word in other statutes has received the interpretation of "now" as of the time when specified statutory conditions arise or are found to exist?

4. Does not the rule that all facts and law be construed in favor of claims to citizenship require adoption of the latter interpretation?

5. May rights of citizenship be destroyed by an ambiguity, which ambiguity is recognized in the decision of the United States Court of Appeals?

6. Can the law of citizenship be so interpreted that a naturalized mother or expatriated mother, who resumed citizenship, passes greater rights to her foreign born child, than does a citizen mother who never lost her citizenship?

7. Can a statute reenacted in June 22, 1874, as a part of the laws then in force reasonably be interpreted to apply only to persons born before April 14, 1802?

8. Should not a court exercise its equitable powers to rectify the frustration by a consular official of the desire and attempt of petitioner's mother to return to the United States before the birth of petitioner, and translate that desire and attempt into fact?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 1a-3a.

STATEMENT OF THE CASE.

This declaratory judgment action was brought under the provisions of Section 360 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1503). The petitioner initiated the suit to determine his citizenship, a controversy having been precipitated by an administrative order directing his deportation. William P. Rogers, Attorney General of the United States, is the respondent as the head of the administrative agency issuing the order.

Petitioner was born in Italy on June 26, 1906. His mother, Maddelena Montana, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Guiseppe (Joe) Montana, father of petitioner. Guiseppe Montana was born in Italy. Prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months preghant.

About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Con-

sul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition • • •. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the petitioner was born on June 26, 1906.

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of petitioner, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'"

Maddelena, with petitioner and his grandmother, then returned to the United States. The records of the Immigration Service produced at the trial reveal that petitioner (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, petitioner lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, petitioner has resided with his own family in the Chicago, Illinois, area.

On January 7, 1958, petitioner was served by the Immigration and Nationality Service with an order to show

cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, petitioner commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain respondent from taking any action on the basis of such proceedings.

The district court, after a trial on the merits, entered judgment in favor of respondent and dismissed the complaint. Appeal was taken to the United States Court of Appeals for the Seventh Circuit. (R. 60).

On April 29, 1960, the said Court of Appeals affirmed the judgment of the District Court, holding that Section 1993 of the Act of 1874 applies exclusively to the instant facts; that since petitioner's father was not a citizen of the United States, no rights of citizenship descended to petitioner at birth; that since petitioner's mother never lost her citizenship, there could be no later resumption of citizenship by which petitioner could claim a derivative naturalization; that no rights of citizenship could accrue to a child under the Fourteenth Amendment by the fact of conception in the United States. (Appendix B, pp. 4a-6a).

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. There is involved herein an important question concerning citizenship, and whether two statutes, legislating on the same issue of derivative citizenship, reenacted simultaneously, can arbitrarily be given a construction whereby one is employed to the exclusion of the other.

2. There is involved herein an important question concerning the interpretation of statutory language applicable to the large class of persons residing in this country, who were born out of the jurisdictional limits of native born citizen mothers between 1874 and 1934. All decisions adverse to such persons, including the decision here sought to be reviewed, are bottomed on an apparent approval of such interpretation by this Court in two cases (*United States* v. *Wong Kim Ark*, 169 U.S. 649; *Weedin* v. *Chin Bow*, 274 U.S. 657), wherein such interpretation was not an issue and neither necessary nor proper to the result. It is eminently and tremendously important that the citizenship status of such persons be determined on nothing less than a direct decision by this Court, after full presentation and argument in a controversy where such status is the issue.

3. It is hereby prayed that this Court review a decision that so interprets the acts of March 2, 1907 and May 24, 1934, that a repatriated and/or a naturalized maternal parent has greater rights in passing citizenship to her minor children than does a native born maternal parent, who never lost United States citizenship.

4. The decision of the United States Court of Appeals for the Seventh Circuit, as it applies the resumption of citizenship statutes to native-born citizen mothers, is in direct conflict with the decision of the District Court of Minnesota in *Petition of Black*, 64 F. Supp. 518 and with the opinion of the Attorney General in *Matter of de Coll*, 37 Op. A. G. 90.

I.

Petitioner contends he was a citizen of the United States, when he was born in 1906 of a United States citizen mother and an alien father. His contention is based on the requirement that effect must be given to the plain words of Section 2172 of the Act of 1874;

> ". . . the children of persons who now are, or have been, citizens of the United States, shall though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; . . ." (Appendix A, p. 1a).

Section 2172 of the Act of 1874 is a substantial reenactment of the Act of April 14, 1802, except that the following proviso was admitted at the time of reenactment.

> "Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: . . ." (Appendix A, p. 1a).

Simultaneous with the reenactment of the aforedescribed statute in 1874, the Act of 1855 was also reaffirmed as Section 1993 of the Act of 1874;

> "All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

It is the holding of the United States Court of Appeals for the Seventh Circuit, "that Section 1993 applies exclusively to the case before us," that "Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth." (Appendix B, p. 8a).

That decision finds its strongest predicate in the word "now" as it appears in Section 2172 of the Act of 1874. The interpretation finds its source in an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney opined that the Act of 1802 was retrospective in application, and that the phrase "children of persons who are now, or have been, citizens of the United States" is operative *only* to persons born prior to the Act of 1802. Binney's interpretation impresses upon the act an intent of the Congress to limit its operation to persons who were or had been citizens prior to 1802 and to leave children born abroad of American citizens after 1802 unprovided for. It is petitioner's contention that this interpretation is not made conclusive by the fortuitous circumstance that Mr. Binney was the only writer to have remarked on the statutory provision, that his singleness of interest is no basis for over-riding all basic tenets of statutory construction, the starting-post being that all facts and law should be construed as far as is reasonably possible in favor of the claimant's citizenship. *Boyd* v. *Nebraska*, 143 U.S. 145.

Mr. Binney's contention for retrospective application of the statute is made in the face of the very strong legal presumption that a statute is not meant to act retrospectively, and that it ought never to receive such a construction unless it is susceptible of no other. The presumption is that a statute will never be so construed unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. *U. S. Fidelity* v. *U. S. for Use and Benefit of Struthers Wells Co.*, 209 U.S. 306; *U. S.* v. *St. Louis, San Francisco and Texas Ry. Co.*, 270 U.S. 1. Certainly there is nothing in the legislative history that compels rebuttal

of the presumption. The Act of 1802 was the repealer of the hated Alien and Sedition laws, the so-called Nationality Act of 1798, it was the Jeffersonian measure designed to replace the Alien and Sedition laws with a *liberal* nationality and naturalization law. Logic requires that we do not attribute to the Jeffersonians a replacement that spoke only as of April 14, 1802, with no provision for the future. We submit that the real or implied intention of Congress does not require retrospective operation. Even Mr. Binney, who contended for the interpretation, admitted he was not able to imagine any plausible political reason for it. (274 U.S. 657, 663).

The other alternative for support of Mr. Binney is that "now" is a word so strong, clear and imperative that it always and invariably means at the present time, that is, at the time of the enactment of the Act of 1802. It is our submission that the statute does not meet the test. There is ample authority for statutory construction of the word "now" relating to a time contemporaneous with satisfaction of the provisions of the Act. See *Protest of Chicago, R. I. & P. Ry. Co.*, 137 Okla. 186; *State* v. *City of St. Lawrence*, 101 Kan. 225; *Thompson* v. *Board of Commissioners of Reno County*, 127 Kans. 863; *Worthen* v. *Burgess*, 273 Mass. 437, *Board* v. *Smith*, 22 Ky. 430; *City of St. Louis* v. *Dorr*, 144 Mo. 466; *Clark* v. *Lord*, 20 Kans. 390; *Tillamook City* v. *Tillamook County Court*, 56 Ore. 112. It is our submission, in accordance with such approved interpretation of the word that "now" means as of the time when any citizenship case arises—that is, the statute speaks as of the time when any person who is a United States citizen has a child born abroad.

The Court of Appeals, by its decision, guilelessly reaffirms the construction for which we contend, wherein it

provides "It is true that Section 2172 was not expressly limited to certain factual situations in period of time prior to 1802." (Appendix B, p. 8a). If it is not expressly limited, then the direction of retrospective operation is not so strong, clear and imperative as to overcome the strong presumption of prospective operation.

The Court of Appeals, nonetheless, relies on certain apparent concurrences by this Court in Mr. Binney's conclusions, as divorced from the reasons for his conclusions. These concurrences are gleaned from *U. S.* v. *Wong Kim Ark*, 169 U.S. 649 and *Weedin* v. *Chin Bow*, 274 U.S. 657.

Wong Kim Ark presented a single question of whether a child born in the United States of alien, resident parents, became at the time of his birth a citizen of the United States. The decision was that, by virtue of the Fourteenth Amendment, he did. Thus was presented an issue and decision wholly distinct from the cause at bar. In *Weedin* v. *Chin Bow, supra,* the issue was presented as to whether citizenship descended to the grandchild of a native born citizen, when the father of the child had never been in the United States prior to the child's birth. *Chin Bow,* in urging certain language in the *Wong Kim Ark* case in support of his position, was met with the retort that "It is very clear that the exact meaning upon the point here at issue was not before the court." (p. 671). We adopt the retort in respect of *Wong Kim Ark* and *Chin Bow* as they were advanced in the instant case. We respectfully submit that rights of citizenship are not to be so casually obliterated as to rely exclusively on language advanced in both instances to demonstrate a wholly separate point, that the questions here involved are of a dignity and importance meriting individual consideration by this Court.

Further difficulty is evidenced by the decision of the Court of Appeals for the Seventh Circuit in trying to reconcile Mr. Binney's interpretation of retrospective application of the Act of 1802 with reenactment of substantially the same statute in 1874. Explanation is given in three alternatives, an implicit recognition of statutory ambiguity, or tribiguity. Before proceeding thereto, it is well to remember the admonition of this Court, in *Perkins* v. *Elg*, 307 U.S. 325 at 337 that "Rights of citizenship are not to be destroyed by an ambiguity."

Recognizing a lack of any express limitation on the operation of Section 2172 in the Act of 1874, the Seventh Circuit opined that "The lack of such limiting language may have been due to inadvertence." (Appendix B, p. 8a). But this is contrary to the presumption that in construing a statute everything has been expressed which was intended, (*Ester* v. *Centennial Board of Finance*, 94 U.S. 500), and is in effect an amendment to this statute.

The second alternative advanced is that "It may have been enacted to apply to situations between 1802 and 1855." (Appendix B, p. 8a). Thus, the Seventh Circuit impresses upon the Act of 1802, as reenacted, prospective application contrary to the rationale upon which this cause was found against your petitioner.

The third alternative is that "It may have been reenacted merely to save rights of citizenship which accrued prior to 1802." (Appendix B, p. 8a). This concurs with the opinion in *Ying* v. *Cahill*, 9th Cir., 81 F. 2d 940, that "now" means April 14, 1802 (p. 943). But this is directly contradictory of the announced intention and object of the Act of 1874 to revise, simply, arrange and consolidate all statutes of the United States *in force* as of June 22, 1874.

The Seventh Circuit opinion continues that "In any event, considering both sections of the Act of 1874, Section 1993 applies exclusively to the factual situation before us." (Appendix B, p. 8a). Thus the court chose to enforce one of two statutes enacted simultaneously and pertaining to the same subject to the total exclusion of the other, though there is no express nor implied suggestion by the legislature to overcome the rule of statutory construction that in such circumstances, the statutes must be treated as mutually operative. *Pen-Ken Gas and Oil Corporation* v. *Warfield Gas Company*, 6 Cir., 137 F. 2d 871, 881.

There are other considerations and rules of statutory construction which militate against the decision entered by the Seventh Circuit in this cause. First, the courts are obliged to consider equity and good conscience in construing doubtful statutes. *Dinkins et al.* v. *Cornish*, E. D. Ark., 41 F. 2d 766, 767. Certainly equity and good conscience rebel at this form of expatriation of a man who has spent the 54 years of his life, save the first few months, in this country, whose physiognomy, demeanor, comportment and language identify him as an American, whose wife and four children, as well as he, know no other country. Further, a statutory construction must not be adopted, the effect of which is to produce inequality and injustice. *Greer* v. *Kinnan*, 8 Cir., 64 F. 2d 605, 607. The present interpretation gives to men as a class greater political rights than to women as a class.

Even more violative of our instinctive resistance to evidences of inequality and unreasoned discrimination is the effect given the Acts of 1907 and 1934 as it applies to the instant cause, a matter treated in the section next ensuing.

II.

In 1907, provision was made for the naturalization of foreign born children of naturalized parents, and of parents who resumed citizenship. Such provision has been found declaratory of the common law. *Petition of Drysdale*, D.C. Mich., 20 F. 2d 957, 958. "Resumed" can only apply to expatriated mothers. "Naturalized" has been judicially determined to refer to either parent. No provision was made for naturalization of a foreign born child of a citizen mother. The necessary inference is that such a child required no provision, that he was a natural born citizen under § 2172, *supra*. Otherwise a naturalized or an expatriated mother who resumed citizenship was, by law, endowed with greater political rights and with power to pass greater rights than a native born mother who never lost her citizenship.

It was urged upon the Seventh Circuit as an alternative and to the District Court for the Northern District of Illinois that, during Mrs. Montana's visit to Italy, it should be considered that her citizenship was in abeyance pending her return to the United States, and that, thus, upon her resumption of residence, petitioner became a citizen under the provisions of Section 5 of the Act of March 2, 1907;

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the . . . resumption of American citizenship by the *parent:* Provided, that such . . . resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." (Appendix A, p. 2a).

As a second alternative, it was submitted to the said courts that petitioner became a citizen by the clear opera-

tion of the Act of May 24, 1934 five years after his entry into the United States in 1906. The application of this statute passed twenty-eight years after his birth finds its justification in the comments of the Senate reporting committee:

> "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer citizenship upon her minor children born abroad who are admitted for permanent residence. The present law appears to confer citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." *U. S. ex rel Guest* v. *Perkins*, D.C. D.C., 17 F. Supp. 177, 181.

The language was *clarified* to read:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the father or the mother: Provided, that such . . . resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." (Appendix A, p. 3a).

The Court of Appeals for the Seventh Circuit rejected the dual alternatives holding that ". . . in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization." (Appendix B, p. 9a). This holding is directly inapposite to the rationale of *Petition of Black*, D. Minn., 64 F. Supp., 518, which held:

> ". . . It is difficult to believe, therefore, that, under these circumstances, Congress intended, by the passage

of the Act of September 22, 1922, to render the citizenship rights of a child born to a marriage after that date less favorable than they would have been if the mother had married prior to September 22, 1922. While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband. Whether, under these circumstances, the resumption of citizenship is termed "fictional" or "real" is of no particular significance. Congress intended that when a mother or father of an alien minor child became an American citizen and the child returned to this country for permanent residence, then the rights of American citizenship should be conferred on the minor child as provided in the Act of May 24, 1934. No sound reason is suggested why any distinction should be made for citizenship purposes under this statute between the mother of an alien child becoming an American citizen, and the mother, a citizen, returning to the United States during the minority of the child for permanent residence and terminating the marriage with the alien father. Here, the factual situation meets every requirement of the statute. The child was born an alien. The mother remained a citizen and freed herself from the bonds of marriage with the alien father by returning to this country for permanent residence and obtaining a divorce. The child has permanently resided here for over five years. The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934, as if she had been married prior to September 22, 1922. Certainly her status as an American citizen, insofar as that would bestow rights upon the minor child is concerned, was the same. It seems clear, therefore, that the factual basis which Congress contemplated as a condition precedent to the

granting of citizenship to an alien minor child has been fully attained. To hold otherwise would be to unduly emphasize form rather than substance . . ." *Petition of Black*, 64 F. Supp. 518, 520-521.

Similarly in 37 Op. A. Ct. 90, William D. Mitchell, then Attorney General, held a foreign born child, Fernando Coll y Picard, to have derived citizenship through its citizen mother even though she had never lost her citizenship. The opinion held that so far as the citizenship of her child is concerned, Mrs. de Coll should be treated as precisely in the same situation as one who had resumed her citizenship.

It is recognized that a certain emphasis is placed on the dissolution of the marriage in the *Black* case. We submit such emphasis is occasioned by the factual circumstances of that case. It is certainly not occasioned by a clear and plain reading of Section 5 of the Act of May 24, 1934, under which it was decided. In any event, it cannot be denied that in the case of a widowed or divorced mother the citizenship of the minors in her custody would follow her citizenship. The contention here is that petitioner did acquire American citizenship by virtue of his mother's nationality and resumption of residence even though his father was then living and in the absence of any decree or arrangement that his mother should have the custody of him. To a similar contention the District Court of the District of Columbia admitted that the "answer to that is not without some doubt." *Kletter* v. *Dulles*, 111 F. Supp. 593, 597. There is no basis in law or reason where all other facts including custody, residence and separation are the same, excepting absolute divorce or death, there should not be equal and like derivation of citizenship.

Further, in, *In the Matter of Owen*, 36 Op. A. G. 197 and in *Petition of Drysdale*, D.C. Mich. 20 F. 2d 957, the native born mothers respectively were naturalized and resumed their American citizenship many years before the deaths of their alien husbands. It seems clear enough that neither child derived citizenship through the deaths of their alien fathers. It had to be through the resumption or naturalization of their mothers, which occurred while both parents were living and residing together in the marital relationship. Similarly, in *U. S. ex rel. Guest v. Perkins*, D.C.D.C., 17 F. Supp. 177, the child's native born mother and his alien father had separated by mutual consent under an agreement in which the custody of the child was given the mother. It was held that the child derived United States citizenship when the mother resumed citizenship.

Does it not offend against, not only equity and good conscience, but common sense, that a child of Prussian parents, all born in Prussia, should be recognized as an American citizen because his later widowed Prussian mother married a naturalized citizen, whereas, this petitioner, the child of a native born citizen and of resident parents, who knows nothing of Italy, its people, its language, its customs, should be considered a citizen and subject of Italy? Compare *U. S. v. Kellar*, C.C. Ill. 13 F. 82.

It is incongruous that persons who derived their citizenship by express mandate of the Constitution, without implementing statute, should be in a position less favorable than those governed by the fluctuating dispositions of Congress.

III.

Briefly the petitioner was born on June 20, 1906. Under commonly accepted concepts he was conceived in mid-September of 1905. His mother left the United States in January, 1906, then four months pregnant. In March, when six months pregnant, the consul refused to allow her, and her unborn child to return to the United States, the place of her nationality and domicile. Until subsequent to his birth, he was prohibited from entering the United States. It was our submission to the lower courts that the rights of the petitioner were seriously impinged upon by an officer of the United States, and that the Courts of the United States should act to rectify the wrong; that this petitioner, having been conceived in the United States should be considered in being from the time of conception.

It was, and is, our submission that the Courts have been consistent and assiduous in rectifying such errors and in translating desire and attempt, wrongfully frustrated by a government official, into fact. Illustratively, we refer the Court to *Dos Reis ex rel. Camara* v. *Nichols*, 1 Cir., 161 F. 2d 860 where the native born Camara, living in the Azores, got his draft notice into the Portuguese Army. Someone at the American consulate told him that if he wanted to join the American Army and avoid service in the Portuguese Army, he should return to America, which he was without means to do. To an administrative determination that he had expatriated himself by service in the Portuguese Army, the Court made a finding that such service was involuntary and under duress and that he was still a citizen of the United States. In *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306, the application of the native born Podea for a passport was denied on the ground that Podea's citizenship was renounced when his father registered as a Roumanian. The Court found that

the State Department's erroneous refusal of a passport led to Podea's being compelled to serve in the Roumanian Army. The Court of Appeals for the Seventh Circuit itself, has held that "Certainly, the Government should not be heard to content that a plaintiff has been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing . . ." *Lee You Fee v. Dulles*, 236 F. 2d 885, 887.

The Board of Immigration Appeals, too, has recognized the intrinsic fairness of rectifying technical losses of citizenship resulting from incorrect information from an American Consular Officer. In the Matter of S, Int. Dec. 974, File A-11537371. There can remain little doubt that a consul's refusal to issue a passport to persons seeking to return to the United States is a denial of a right or privilege as a citizen of the United States. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753. However, the Seventh Circuit found "the action of the American Consul in Naples . . . not sufficient as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native born citizens: the issues there were voluntary expatriation. These holdings do not control the situation here." (Appendix B, p. 9a). The basis for the decision is without merit. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753; *Lee Bang Hong* v. *Acheson*, D. Hawaii, 110 F. Supp. 49, 50; *Lee Hong* v. *Acheson*, D.C. Cal., 110 F. Supp. 60.

CONCLUSION.

Wherefore, for foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANNA R. LAVIN,
Attorney for petitioner

APPENDIX A.

ACT OF 1874.

"Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed."

ACT OF 1802.

"Sec. 4, And be it further enacted, That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided that no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great

Britain, during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed."

ACT OF 1874.

"Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were and may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

ACT OF MARCH 2, 1907.

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child: And Provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

ACT OF MAY 24, 1934.

(48 Stat. L., Part 1, 797)

An Act to amend the law relative to citizenship and naturalization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1993 of the Revised Statutes is amended to read as follows:

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Sec. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: Provided, That such naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

APPENDIX B.

SEPTEMBER TERM, 1959—APRIL SESSION, 1960.

No. 12851

MAURO JOHN MONTANA,
Plaintiff-Appellant.
v.
WILLIAM P. ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 29, 1960

Before HASTINGS, *Chief Judge*, DUFFY and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* This declaratory judgment action was brought in the district court under the provisions of Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1503. Mauro John Montana, plaintiff-appellant (plaintiff), initiated this suit to determine his citizenship, a controversy having been precipitated by an administrative order for his deportation. William P. Rogers, Attorney General of the United States, is defendant-appellee.

The facts of the case are simple and not in dispute—plaintiff was born in Italy in 1906, the son of an alien father and a citizen mother. He claims he is a citizen of the United States. The application of the proper law to this factual situation is the controlling consideration before us.

The record reveals the following events. Maddelena Montana, mother of plaintiff, was born in Jersey City,

New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Guiseppe (Joe) Montana, father of plaintiff. Guiseppe Montana was born in Italy; prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United Sttaes en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months pregnant.

Maddelena, the sole witness in the declaratory judgment action under review (plaintiff's illness precluded his testifying; the government offered no evidence) testified as to those subsequent events. About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition * * *. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the plaintiff was born on June 26, 1906.

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of plaintiff, Maddelena returned to the American Consul from whom she secured a passport. She

stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'"

Maddelena, with plaintiff and his grandmother, then returned to the United States. The records of the Immigration Service produced at the trial reveal that plaintiff (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, plaintiff lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, plaintiff has resided with his own family in the Chicago, Illinois area. At no time has he instituted naturalization proceedings.

On January 7, 1958, plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, plaintiff commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain defendant from taking any action on the basis of such proceedings.

In action relevant to this appeal, the district court, after a trial on the merits, entered judgment in favor of defendant and dismissed the complaint, from which judgment this appeal is taken.

On the basis of the described facts, plaintiff offers six theories which he contends establish his citizenship. His central argument revolves around the applicable statutory law in existence at the time of his birth. Plaintiff asserts that he became a citizen at birth by the operation of Section 2172 of the Revised Statutes of the United States.[1]

[1] Section 2172, Rev. Stat. § 2172 (1875), provided in relevant part: "* * * and *the children of persons who now are, or have been, citizens of the United States,* shall, though born out of the limits and jurisdiction of the United States, be considered as citizens * * *." (Emphasis added.)

The Attorney General contends that Section 1993 of the Revised Statutes[2] exclusively and precisely controls the factual situation in question here and that citizenship under that section can be conferred to a child born abroad *only if the father was a citizen.*

Both Sections 2172 and 1993 were enacted as a part of the Act of June 20, 1874, 18 Stat. ch. 333, a comprehensive codification of all laws (including existing nationality statutes) which repealed prior laws. No other relevant statutes were enacted prior to plaintiff's birth in 1906. Section 2172, as enacted was substantially identical to Section 4 of the Act of 1802, 2 Stat. 155 (see 8 U.S.C.A. §§ 1-18, Historical Note). Section 1993 reenacted the Citizenship Act of 1855, 10 Stat. 604.

Congress had passed the Act of 1855 in response to an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney declared that the Act of 1802 was retrospective in application; that the phrase "children of persons who now are, or have been, citizens of the United States" is operative *only* to persons born prior to the Act of 1802; and that there were no operative statutes covering similar situations subsequent to 1802. The Act of 1855 remedied that defect. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 665, 673, 674 (1898); *Weedin* v. *Chin Bow*, 274 U.S. 657, 663, 664 (1927). That statute provided that persons "*heretofore or hereafter*" born abroad of *citizen fathers* (when such fathers had resided in the United States) were declared to be citizens of the United States. This Act expressly operated retrospectively and prospectively, but no repealer of the Act of 1802 was provided.

This provision was reenacted by the Act of 1874 and appeared as Section 1993 of the Revised Statutes. It expressly applied prospectively and retrospectively. However, plaintiff contends that Section 2172, reenacted concurrently, operated prospectively and is the basis for de-

[2] Section 1993, Rev. Stat. § 1993 (1875), provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, *whose fathers were* and may be at the time of their birth, *citizens* thereof, are declared to be citizens of the United States; but rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

claring his citizenship.[3] It is true that Section 2172 was not expressly limited to certain factual situations in point of time prior to 1802. The lack of such limiting language may have been due to inadvertence. It may have been enacted to apply to situations between 1802 and 1855. Cf. *Wong Kim Ark*, 169 U.S. at page 674. It may have been reenacted merely to save rights of citizenship which accrued prior to 1802.

In any event; considering both sections of the Act of 1874, we hold that Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth. This determination is consistent with the holdings in *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940 (1936); and *Anthony D'Alessio* v. *John M. Lehman, District Director of Immigration and Naturalization Service*, N.D.D.C. Ohio, ... F. Supp. ..... (Feb. 26, 1960).

Plaintiff advances other theories of citizenship based on statutory grounds. They can be rejected summarily. Plaintiff argues that citizenship vested in him under Section 1993, *supra*, since at birth he was in the sole custody of his mother (his father having returned to the United States). However, the Department of State ruling he relies upon relates to illegitimate children who do not have a father in contemplation of law. In addition, plaintiff argues that Section 1 of the Act of 1934, 48 Stat. 797, (which grants citizenship to infants born abroad to either a citizen father *or* mother) is prospective and retrospective in operation and that it is merely declaratory of existing law. But an examination of this section reveals that it is expressly limited in its operation to children "hereafter born" abroad. Finally, plaintiff argues that he gained citizenship by the terms of Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228, 1229. This act denationalized American women who married aliens and

[3] Plaintiff construes the provision "the children of persons" to apply in the distributive and not to require both parents to be citizens; and "now are or have been * * * born" to operate both prospectively and retrospectively.

provided that minor children born abroad of such alien parents should be deemed citizens of the United States upon the resumption of American citizenship by the mother. However, in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization. See *In re Wright*, E.D.D.C. Pa., 19 F. Supp. 224 (1937).

Plaintiff has advanced a novel constitutional argument that Fourteenth Amendment rights of citizenship attach at the moment of conception and that since plaintiff was conceived in the United States, he is a citizen. Whatever rights might accrue to an unborn child by the operation of the common law and by statute, it is clear that the Fourteenth Amendment limits citizenship to persons "*born* • • • in the United States."

Further, the action of the American Consul in Naples (even if one is fully to believe Maddelena) in refusing to issue a passport is not sufficient, as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native-born citizens; the issues there were voluntary expatriation. These holdings do not control the situation before us. See *Dos Reis* v. *Nicolls*, 1 Cir., 161 F. 2d 860 (1947); and *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306 (1950).

Finally, even if the action of Immigration officials (the record of such action was introduced at trial) was sufficient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry. See *Lee Hon Lung* v. *Dulles*, 9 Cir., 261 F. 2d 719 (1958); and *Delmore* v. *Brownell*, 3 Cir., 236 F. 2d 598 (1956). Such designation of plaintiff's citizenship was neither the formal adjudication in *Lung* nor the considered determination in *Delmore*.

The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois

Thursday, May 26, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

No. 12851

MAURO JOHN MONTANA,
Plaintiff-Appellant,
v.
WILLIAM ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, May 31, 1960
Hon. John S. Hastings, Chief Judge

No. 12851
MAURO JOHN MONTANA,
Plaintiff-Appellant,
v.
WILLIAM ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On petition of counsel for plaintiff-appellant,

It Is Ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed to and including June 30, 1960, pursuant to provisions of Rule 28 of the Rules of this Court.